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CHOONG HOWEI v. CHEAH CHOO ENG & ORS AND ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
MOHD HISHAMUDIN YUNUS JCA
AZAHAR MOHAMED FCJ
B ZAKARIA SAM JCA
[CIVIL APPEALS NO: B-02-2785-11-2012 & B-02-2786-11-2012]
4 SEPTEMBER 2015

CIVIL PROCEDURE: *Judgments and orders – Setting aside – Allegation of failure*
C *to make full and frank disclosure of material facts in obtaining order – Whether order irregular or a nullity – Whether application to set aside order could be made through separate court action – Whether application to set aside order barred by laches*

COMPANY LAW: *Meetings – Extraordinary general meeting (EGM) –*
D *Appointment of new board of directors – Company secretary refused to certify extract of EGM – Registration of new board of directors in Companies Commission of Malaysia rejected – Whether previous board of directors remained as directors of company*

Wilayah Pool Berhad ('the company') was an investment holding company. Collectively the respondents held 192,000 shares out of a total of 1,213,000
E shares in the Company. Prior to the extraordinary general meeting ('EGM') of 17 September 2009, the Board of Directors of the company consisted of the first till the seventh appellant and the ninth and tenth appellant in appeal 2786 ('the old board of directors'). At the EGM, a resolution was passed for the removal of the old board of directors and the respondents were elected
F as the new board of directors. The new board of directors had asked the company's secretary, one Foo Poh Khean, to certify the extract of the EGM for submission to the Companies Commission of Malaysia ('CCM') so that the new board of directors would be registered in the CCM records. Foo Poh Khean, however, refused to certify. This resulted in the documentations filed
G by the respondents with the CCM being rejected. The members present at the EGM then elected one Ow Sam Loy to act as the secretary of the EGM. Choong Howei, a shareholder of the company, conducted a search at the office of the CCM to ascertain the members of the board of directors of the company. The search showed that the old board of directors were still on record as the board of directors of the company. On 13 August 2010, Choong
H Howei filed an action ('OS 1926') against the company and sought, *inter alia*, for an order that the old board of directors (i) fix a date for the AGM for year 2010; (ii) prepare the audited accounts of the company; and (iii) to issue notice of the AGM to all the registered shareholders of the company. The company did not defend the suit. Consequently, on 9 November 2010
I Choong Howei obtained an order as prayed for in OS 1926 ('the court's order of 9 November 2010') based on the merits of the application. The company

paid Choong Howei a sum of RM35,000 as agreed costs. In compliance with the court's order of 9 November 2010, the old board of directors convened an AGM of the Company for the year 2010. The company then commenced an action against the respondents in the Sessions Court *vide* ('summons 1783') claiming that the respondents were liable to reimburse the company the sum of RM35,000 that was paid by the company to Choong Howei as costs. The Sessions Court allowed the company's claim. In the present action ('OS 2399') filed in the High Court, the respondents' complaint was that the court order of 9 November 2010 was irregular, therefore, the respondents applied to set aside the order of 9 November 2010 and consequently, applied for a declaration that the AGMs of 2010 and 2011 were null and void. The High Court Judge ('HCJ') found that there was no full and frank disclosure of the facts of the case presented to the trial judge at the hearing of the OS 1926 and therefore, the default order dated 9 November 2010 was a nullity and was set aside. In the present appeals (appeal 2786 and appeal 2785), the appellants contended that the HCJ had erred in her decision for reasons, *inter alia*, that the HCJ had failed to consider that the respondents were guilty of laches.

Held (allowing appeals with costs; setting aside order of the High Court):
Per Mohd Hishamudin Yunus JCA delivering the judgment of the court:

(1) The HCJ in her grounds of judgment referred to the order dated 9 November 2010 as a 'default' judgment. However, it was not a default judgment. It was a judgment based on the merits. (para 27)

(2) The respondents could apply to the court to impugn the order dated 9 November 2010 *via* a separate court action, instead of by way of an appeal, because the respondents' allegation was that there had been a fraudulent concealment of a material fact. (para 34)

(3) The respondents could have appealed to the High Court pursuant to s. 11(10) of the Companies Act 1965 against the refusal of the CCM to register the new board of directors. Since the respondents failed to enforce their right to be registered as the new directors of the company after a substantial lapse of time, Choong Howei, pursuant to the information obtained from the search made at the CCM, had the right to treat the old board of directors (meaning the appellants in appeal 2786), and not the respondents, as the directors of the company at the time of filing OS 1926. The question of Choong Howei concealing a material fact as to the affairs of the company in his OS 1926 application did not arise. The respondents therefore had failed to establish fraudulent concealment of a material fact and the order of 9 November 2010 cannot be said to be irregular or a nullity. (paras 40 & 41)

(4) The respondents were also guilty of laches. They were elected as the new directors of the company on 17 September 2009, yet right until they filed the OS 2399 on 14 September 2011, a lapse of two years, they did nothing to ensure that they were registered with CCM as the new directors. Instead, they had allowed the names of the old directors to remain in the records of the CCM. Further, during the two-year period the respondents had allowed two AGMs of the company to take place *ie*, the AGM of 30 December 2010 (pursuant to the court order of 9 November 2010) and the AGM of 27 June 2011 without taking steps to promptly challenge the validity of either the order of 9 November 2010 or the two AGMs. (paras 42 & 43)

(5) It was clear that the respondents had slept upon their rights and acquiesced for a great length of time. Thus, the respondents by reason of the inordinate delay and their conduct, were estopped from challenging the validity of the order of 9 November 2010 or the validity of the two AGMs. (para 45)

Bahasa Malaysia *Translation Of Headnotes*

Wilayah Pool Berhad ('syarikat') merupakan sebuah syarikat pegangan pelaburan. Secara kolektif, responden memegang 192,000 saham daripada sejumlah 1,213,000 saham dalam syarikat tersebut. Sebelum mesyuarat agung luar biasa ('EGM') 17 September 2009, lembaga pengarah syarikat terdiri daripada perayu pertama hingga ketujuh dan perayu kesembilan dan kesepuluh dalam rayuan 2786 ('lembaga pengarah lama'). Semasa EGM, resolusi penyingkiran lembaga pengarah lama telah diluluskan dan responden-respondan dilantik sebagai lembaga pengarah baru. Lembaga pengarah baru meminta setiausaha syarikat, seorang yang bernama Foo Poh Khean, untuk mengesahkan pengekstrakan EGM untuk dikemukakan kepada Suruhanjaya Syarikat Malaysia ('CCM') supaya lembaga pengarah baru dapat didaftarkan dalam rekod CCM. Foo Poh Khean, walau bagaimanapun, enggan mengesahkan pengekstrakan EGM tersebut. Ini menyebabkan dokumentasi yang difailkan oleh responden-responden kepada SSM ditolak. Ahli-ahli yang hadir semasa EGM tersebut memilih seorang yang bernama Ow Sam Loy untuk bertindak sebagai setiausaha EGM tersebut. Choong Howei, seorang pemegang saham syarikat, telah menjalankan carian di pejabat CCM untuk menentukan ahli-ahli lembaga pengarah syarikat. Carian tersebut menunjukkan bahawa lembaga pengarah lama masih direkodkan sebagai lembaga pengarah syarikat. Pada 13 Ogos 2010, Choong Howei memfailkan tindakan terhadap syarikat melalui ('OS 1926') dan memohon, antara lain, untuk perintah supaya lembaga pengarah lama (i) menetapkan tarikh mesyuarat agung tahunan bagi tahun 2010; (ii) menyediakan akaun yang telah diaudit untuk syarikat; dan (iii) untuk mengeluarkan notis mesyuarat agung tahunan kepada semua pemegang saham berdaftar syarikat. Syarikat tidak membela tindakan tersebut. Oleh itu, pada 9 November 2010,

Choong Howei memperolehi perintah seperti yang dipohon dalam OS 1926 ('perintah mahkamah bertarikh 9 November 2010') berdasarkan merit permohonan tersebut. Syarikat membayar Choong Howei sejumlah RM35,000 sebagai kos yang dipersetujui. Dalam mematuhi perintah mahkamah bertarikh 9 November 2010, lembaga pengarah lama telah mengadakan mesyuarat agung tahunan syarikat bagi tahun 2010. Syarikat kemudiannya memulakan tindakan terhadap responden-responden di Mahkamah Sesyen melalui ('saman 1783') menuntut bahawa responden-responden bertanggungan untuk membayar balik kepada syarikat jumlah RM35,000 yang telah dibayar oleh syarikat kepada Choong Howei sebagai kos. Mahkamah Sesyen telah membenarkan tuntutan syarikat. Dalam tindakan ini yang difailkan di Mahkamah Tinggi ('OS 2399'), aduan responden-responden adalah bahawa perintah mahkamah bertarikh 9 November 2010 adalah tidak teratur, oleh itu, responden-responden memohon untuk mengetepikan perintah mahkamah bertarikh 9 November 2010 dan seterusnya, memohon pengisytiharan bahawa AGM 2010 dan 2011 adalah tidak sah dan terbatal. Hakim Mahkamah Tinggi ('HMT') mendapati bahawa tidak ada pendedahan penuh dan berterus terang daripada fakta kes yang dikemukakan kepada hakim bicara dalam perbicaraan OS 1926 dan oleh itu, perintah ingkar yang bertarikh 9 November 2010 adalah terbatal dan diketepikan. Dalam rayuan-rayuan ini (rayuan 2786 dan rayuan 2785), perayu menghujahkan bahawa HMT telah terkhilaf dalam keputusannya berdasarkan alasan, antara lain bahawa HMT telah gagal mengambil kira bahawa responden-responden bersalah atas kelengahan.

Diputuskan (membenarkan rayuan dengan kos; mengetepikan perintah Mahkamah Tinggi):
Oleh Mohd Hishamudin Yunus HMR menyampaikan penghakiman mahkamah:

(1) Dalam alasan penghakiman beliau, HMT telah merujuk kepada perintah bertarikh 9 November 2010 sebagai penghakiman 'ingkar'. Walau bagaimanapun, ia bukan satu penghakiman ingkar. Ia adalah keputusan berdasarkan merit.

(2) Responden-responden boleh memohon kepada mahkamah untuk mempersoalkan perintah bertarikh 9 November 2010 melalui tindakan mahkamah yang berasingan, dan bukannya dengan cara rayuan, kerana dakwaan responden adalah bahawa terdapat penyembunyian frod sesuatu fakta material.

(3) Responden boleh membuat rayuan kepada Mahkamah Tinggi menurut s. 11(10) Akta Syarikat 1965 terhadap keengganan CCM untuk mendaftar lembaga baru pengarah. Oleh kerana responden gagal menguatkuasakan hak mereka untuk didaftarkan sebagai pengarah syarikat baru selepas tempoh yang lama, Choong Howei, menurut maklumat yang diperolehi dari carian CCM, mempunyai hak untuk

menganggap lembaga pengarah lama (iaitu perayu dalam rayuan 2786), dan bukan responden, sebagai pengarah syarikat semasa memfailkan OS 1926. Persoalan Choong Howei menyembunyikan sesuatu fakta material mengenai hal ehwal syarikat dalam permohonan OS 1926 tidak timbul. Oleh itu, responden gagal membuktikan penyembunyian secara frod sesuatu fakta material dan perintah bertarikh 9 November 2010 tidak boleh dikatakan tidak teratur atau terbatal.

(4) Responden juga bersalah atas kelengahan. Mereka dipilih sebagai pengarah baru syarikat pada 17 September 2009, namun sehingga mereka memfailkan OS 2399 pada 14 September 2011, selang dua tahun, mereka tidak melakukan apa-apa untuk memastikan mereka didaftarkan dengan CCM sebagai pengarah baru. Sebaliknya, mereka membenarkan nama-nama pengarah lama kekal dalam rekod CCM. Di samping itu, dalam tempoh dua tahun, responden-responden telah membenarkan dua AGM syarikat berlangsung iaitu AGM 30 Disember 2010 (menurut perintah mahkamah 9 November 2010) dan AGM 27 Jun 2011 tanpa mengambil langkah segera untuk mencabar kesahihan perintah bertarikh 9 November 2010 atau dua-dua AGM tersebut.

(5) Jelas bahawa responden telah mengabaikan hak-hak mereka dan akur untuk jangka masa yang lama. Oleh itu, responden atas sebab kelengahan yang lama dan tindakan mereka, telah diestop daripada mencabar kesahihan perintah bertarikh 9 November 2010 atau kesahihan kedua-dua AGM.

Case(s) referred to:

Alfred Templeton & Ors v. Mount Pleasure Corp Sdn Bhd [1989] 1 CLJ 693; [1989] 1 CLJ (Rep) 219 HC ***(refd)***

Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 FC ***(refd)***

Hock Hua Bank Bhd v. Sahari Murid [1980] 1 LNS 92 FC ***(refd)***

Lindsay Petroleum Co v. Hurd (1874) LR 5 PC 221 ***(refd)***

Pilecon Engineering Bhd v. Malayan Banking Bhd & Ors [2011] 1 LNS 1492 HC ***(refd)***

Serac Asia Sdn Bhd v. Sepakat Insurance Brokers Sdn Bhd [2013] 6 CLJ 673 FC ***(refd)***

Legislation referred to:

Companies Act 1965, s. 11(9), (10)

(Civil Appeal No: B-02-2785-11-2012)
For the appellant - Eg Kaa Chee; M/s Rajah, Lau & Assocs
For the respondents - Yusuf Khan (Fong Teng Fook with him); M/s Yusuf Khan & Fong

(Civil Appeal No: B-02-2786-11-2012)
For the appellants - Francis Goh; M/s Francis Goh & Co
For the respondents - Yusuf Khan (Fong Teng Fook with him); M/s Yusuf Khan & Fong

[Appeal from High Court, Shah Alam; Originating Summons No: 24-2399-09-2011]

Reported by Sandra Gabriel

JUDGMENT

Mohd Hishamudin Yunus JCA:

Introduction

[1] There are two appeals before us, namely:

(a) Civil Appeal No. B-02-2785-11-2012 ('Appeal 2785'); and

(b) Civil Appeal No. B-02-2786-11-2012 ('Appeal 2786').

[2] They were heard together.

[3] These appeals arose from a decision of the High Court of Shah Alam of 22 October 2012 on an originating summons application by the respondents in the appeals, namely, Shah Alam High Court Originating Summons No. 24-2399-09-2011 ('the OS 2399'). The respondents are the plaintiffs in OS 2399.

[4] The High Court of Shah Alam, by its decision of 22 October 2012, had allowed the respondents'/plaintiffs' application in OS 2399; and had made the following order:

(a) An order declaring that the decision taken and resolutions passed at the extraordinary general meeting of Wilayah Car Pool Berhad on 17 September 2009 ('the EGM') is valid and enforceable in law.

(b) An order that the Companies Commission of Malaysia do register the Form 48A and Form 49 of Wilayah Car Pool Berhad ('the company') in respect of the result of the EGM.

(c) An order that the order of the court dated 9 November 2010 granted by the Shah Alam High Court in Originating Summons No. 24-1926-2010 ('OS 1926') is set aside forthwith.

(d) A declaration that the annual general meeting of the company held on 30 December 2010 ('the AGM of 30 December 2010') is null and void.

(e) A declaration that the annual general meeting of the company held on 27 June 2011 ('the AGM of 27 June 2011') is null and void.

(f) An order that the second, third, fourth, fifth, sixth, seventh, and eighth defendants do deliver all the statutory records, accounting records and properties of the company to the board of directors elected at the EGM.

(g) An order that the costs of this action be taxed and paid forthwith by the defendants to the plaintiffs.

(h) An order that the first defendant refund and reimburse the company the amount of RM35,000 paid by the company to the first defendant.

(i) An order that the defendants do pay all the loss and damages incurred by Wilayah Car Pool Berhad consequent to the order dated 9 November 2010 in the Shah Alam High Court Originating Summons No. 24-1926-2010.

(j) An order that the ninth defendant, Foo Poh Khean, do pay all the loss and damages of Wilayah Car Pool Berhad.

[5] The appellants in the present appeals are the defendants in the OS 2399. 'First defendant' in the above order refers to the first defendant in OS 2399, Choong Howei, who is the sole appellant in Appeal 2785. 'Ninth defendant' in the above order refers to the ninth defendant in OS 2399, Foo Poh Khean, and the eighth appellant in Appeal 2786. 'Second, third, fourth, fifth, sixth, seventh, and eighth defendants' in the above order refers to the second, third, fourth, fifth, sixth, seventh, and eighth defendants, respectively, in OS 2399, and are the first appellant (Choong Chee Hoong), second appellant (Chong Kwan Kian), third appellant (Lim Ting Ching), fourth appellant (Lee Lai Chan), fifth appellant (Liew Boon Chuan), sixth appellant (Moo Thart Choong) and seventh appellant (Ng Cheak Kheng), respectively, in Appeal 2786.

[6] Aggrieved by the decision, the appellants/defendants, by two separate notices of appeal, appealed to this court. The single appellant in Appeal 2785 filed his notice of appeal on 12 November 2012, and the ten appellants in Appeal 2786 filed their joint notice of appeal on 8 November 2012.

[7] We heard the two appeals together on 29 May 2014, 8 August 2014 and 31 October 2014. At the conclusion of the hearing of the appeals (on 31 October 2014), by a unanimous decision, we allowed the appeals with costs.

[8] We now give our grounds.

Facts Of The Case

[9] The company (the tenth defendant in OS 2399; but not a party in these appeals) was incorporated on the 25 October 1994 as an investment holding company. Its shareholders are owners of driving schools. It has both its registered and business addresses at Lot 8660, Jalan Besar, Kpg Sg Buah Luar, Dengkil, Selangor. The company holds 82% shares in a company known as Pusat Latihan Memandu Cemerlang Berhad (PLMCB). PLMCB is in the business of providing driving courses and driving tests.

[10] Collectively the respondents hold 192,000 shares out of a total of 1,213,000 shares in the company. In other words the respondents hold only 15.8% shares in the company.

[11] Prior to the EGM of 17 September 2009, the board of directors of the company consisted of the following nine persons:

(a) Choong Chee Hoong (first appellant in Appeal 2786/second defendant);

(b) Chong Kwan Kian (second appellant in Appeal 2786/third defendant);

(c) Lim Ting Ching (third appellant in Appeal 2786/fourth defendant);

(d) Lee Lai Chan (fourth appellant in Appeal 2786/fifth defendant);

(e) Liew Boon Chuan (fifth appellant in Appellant 2786/sixth defendant).

(f) Moo Thart Choong (sixth appellant in Appeal 2786/seventh defendant);

(g) Ng Cheak Kheng (seventh appellant in Appeal 2786/eighth defendant);

(h) Koh Ah Bah (ninth appellant in Appeal 2786/eleventh defendant);

(i) Yeow Bon Chong (tenth appellant in Appeal 2786/twelfth defendant);

[12] This board of directors will be referred to in this judgment as 'the old board of directors'. An EGM of the company took place on 17 September 2009. At this EGM a resolution was passed for the removal of the old board of directors; and all the respondents were elected as the new board of directors. The new board of directors had asked the company's secretary, Foo Poh Khean, to certify the extract of the EGM for submission to the Companies Commission of Malaysia ('CCM') so that the new board of directors would be registered in the CCM records.

[13] Foo Poh Khean, however, refused to certify. This resulted in the documentations filed by the respondents with the CCM being rejected. The CCM required a director of the company and the company secretary to jointly certify the extract of the EGM. What had happened was that at the EGM Foo Poh Khean had refused to be the secretary of the EGM and to take down the minutes. The members present at the EGM then elected one Ow Sam Loy to act as the secretary of the EGM.

[14] About eight months after the EGM, on 2 June 2010, Choong Howei, a shareholder, wrote to the company secretary (Foo Poh Khean) inquiring whether the company's AGM for the year 2010 had been held; and, if not held, what was the last day for the AGM to be held. By a letter dated 3 June 2010 the company secretary replied that the last day for the AGM to be held was 30 June 2010; and that he did not receive any instruction from the board of directors of the company to hold any AGM for the year 2010.

[15] Choong Howei in a subsequent inquiry to the company secretary *vide* letter dated 23 June 2010 asked as to whether the company had received dividends from its subsidiary Pusat Latihan Memandu Cemerlang Berhad ('PLMCB') and had declared the dividends to its shareholders. The company secretary by his letter dated 24 June 2010 replied that the company did receive dividends from PLMCB but had not declared the dividends to the shareholders of the company since no meeting of the board of directors had been held since 25 August 2009. Now the Companies Act 1965 ('the Companies Act') requires that the AGM be held latest by 30 June 2010. Failure to do so amounts to a breach of the Act.

[16] Choong Howei then made a search at the office of the CCM to ascertain who were the members of the board of directors of the company. The search showed that the following persons were still listed as the board of directors:

A (a) Choong Chee Hoong (first appellant in Appeal 2786/second defendant);

(b) Chong Kwan Kian (second appellant in Appeal 2786/third defendant);

(c) Lim Ting Ching (third appellant in Appeal 2786/fourth defendant);

(d) Lee Lai Chan (fourth appellant in Appeal 2786/fifth defendant);

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(e) Liew Boon Chuan (fifth appellant in Appeal 2786/sixth defendant).

(f) Moo Thart Choong (sixth appellant in Appeal 2786/seventh defendant);

(g) Ng Cheak Kheng (seventh appellant in Appeal 2786/eighth defendant);

C (h) Koh Ah Bah (eleventh defendant);

(i) Yeow Bon Chong (twelfth defendant);

[17] In other words, the old board of directors was still on record the board of directors of the company.

D **[18]** On 13 August 2010 Choong Howei filed an action against the Company *vide* Shah Alam High Court Originating Summons No. 24-1926-2010 ('the OS 1926') seeking for an order:

(a) That the company convened an AGM for the year 2010.

E (b) That the old board of directors do forthwith:

(i) fix a date for the AGM for year 2010;

(ii) prepare the audited accounts of the company; and

(iii) to issue notice of the AGM to all the registered shareholders of the

F company.

[19] The cause papers for the OS 1926 were duly served on the company. The company did not defend the suit. No affidavit in opposition was filed. The company and its counsel were not present at the hearing of the OS 1926 on 9 November 2010. Consequently, on 9 November 2010 Choong Howei

G obtained an order as prayed for in the originating summons based on the merits of the application.

[20] The company paid Choong Howei a sum of RM35,000 as agreed costs.

[21] In compliance with the court's order of 9 November 2010 (in OS

H 1926), the old board of directors convened the AGM of the company for the year 2010.

[22] On 19 May 2011 the appellants in Appeal 2786 through their solicitors (Messrs Francis Goh & Co) issued a notice demanding each of the respondents to pay costs of RM35,000. They refused to pay. The company

I then commenced an action against the respondents *vide* Shah Alam Sessions Court Summons No. 52-1783-2011 claiming that the respondents were

jointly and severally liable to reimburse the company the sum of RM35,000 that was paid by the company to Choong Howei as costs. The company succeeded in its claim.

The Respondents' Claim In The Present Action (OS 2399)

[23] The respondents'/plaintiffs' complaint is that the court order of 9 November 2010 (in OS 1926) is irregular for the following alleged reasons:

(a) Choong Howei had knowledge that the respondents were elected as new directors of the company on 17 September 2009 but had feigned ignorance, and in the OS 1926 had named the old board of directors as the directors of the company to carry out the AGM for the year 2010.

(b) Choong Chee Hoong had acknowledged that the respondents were the elected directors of the company at the EGM, yet he went ahead to lead the old board of directors, to represent the company, and to convene the AGM. It is the respondents who should have convened the AGM since they were the new board of directors.

(c) The AGM of 30 December 2010 was null and void as it was not convened by the legally constituted board of directors.

(d) Messrs Francis Goh & Co on behalf of the appellants in Appeal 2786 had proceeded to claim against each of the respondents for RM35,000 as costs in the OS 1926 proceedings. The appellants alleged that the respondents were the directors who were responsible for the loss of RM35,000. But this allegation is in direct contradiction to the position taken by Choong Chee Hoong in respect of the AGM.

(e) Choong Howei had no locus to commence the OS 1926.

[24] Therefore, the respondents seek, among others, the following declarations or orders:

(a) A declaration that the decision taken and resolutions passed at the EGM is valid and enforceable in law.

(b) An order that the CCM do register the Form 48A and Form 49 of the company that had been submitted as a record of the result of the EGM.

(c) An order that the order of 9 November 2010 granted under OS 1926 be set aside forthwith.

(d) A declaration that the AGM of 30 December 2010 is null and void.

(e) A declaration that the AGM of 27 June 2011 is null and void.

The Decision Of The High Court Judge

[25] The judgment of the learned High Court Judge, with respect, is disappointing. It is brief and lacks judicial analysis. After setting out the 'plaintiffs' complaint' in her grounds of judgment, the learned High Court Judge then abruptly made the following brief findings:

A Findings

(1) There was no full and frank disclosure of the facts of the case presented to the trial judge at the hearing of the Originating Summons No. 24-1926-2010. If full and frank disclosure had been made, I am sure the court would not have granted the order dated
B 9 November 2010.

(2) The default order dated 9 November 2010 is a nullity and must be set aside.

(3) The 1st defendant is using the court as a tool to obtain his agenda of calling for an Annual General Meeting of the company. As the
C order dated 9 November 2010 is a nullity, the Annual General Meetings held in 2010 and 2011 are invalid.

(4) The 1st defendant is not entitled to retain the RM35,000 costs given to him by the Company for an irregular default judgment.

(5) The plaintiffs herein had become the victims of unscrupulous acts
D of the 1st, 2nd, and 9th defendants. The plaintiffs are the new Board of Directors who should manage the company.

[26] Why did the learned High Court Judge hold that there was no full and frank disclosure? This is not explained in her grounds of judgment. Why did she hold that the order of 9 November 2010 was a nullity? Again this is not
E explained. It hardly needs reminding that every judgment must be a reasoned judgment with clear judicial analysis.

[27] The learned High Court Judge in her grounds of judgment referred to the order of 9 November 2010 as a 'default' judgment. We have read the judgment. With respect, it is not a default judgment. Mr Yusuf Khan
F concedes that it is not a default judgment. It is a judgment based on the merits.

The Appellants' Submission

[28] In these appeals, Mr Francis Goh (learned counsel for the appellants
G in Appeal 2786) and Mr Eg Kaa Chee (learned counsel for the appellant in Appeal 2785), in their respective submissions, contend that the learned High Court Judge had erred in her decision for two reasons, namely:

(a) The learned High Court Judge cannot set aside the order of the High Court in OS 1926. This is because one High Court cannot set aside the
H decision of another High Court of co-ordinate jurisdiction.

(b) The learned High Court Judge failed to consider that the respondents were guilty of laches.

First Issue: Whether One High Court May Set Aside The Decision Of Another
I *High Court Of Co-ordinate Jurisdiction*

[29] In the present OS 2399, filed on 14 September 2011, the respondents apply to set aside the order of 9 November 2010 made under OS 1926 by Hinshawati Shariff J, and, consequently, apply for a declaration that the

AGMs of 2010 and 2011 are null and void. The issue before us is this: whether one High Court may set aside the decision of another High Court of co-ordinate jurisdiction. We note that the appellants had also raised this issue before the High Court. The learned High Court Judge, however, in her brief grounds of judgment, failed to address this issue.

[30] Mr Francis Goh (supported by Mr Eg) submits that the respondents in law cannot apply to set aside the order of 9 November 2009 made under the OS 1926 by way of a separate Originating Summons Action (OS 2399). Learned counsel refers to the general principle that one High Court cannot set aside the order of another High Court of concurrent jurisdiction. The proper procedure is to appeal. Counsel refers to *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75; [1998] 1 MLJ 393 where the Federal Court (the judgment of Mohd Azmi FCJ) states the basic principle:

> It is of course settled law as laid down by the Federal Court in *Hock Hua Bank* case that one High Court cannot set aside a final order regularly obtained from another High Court of concurrent jurisdiction.

[31] Learned counsel also cites *Pilecon Engineering Berhad v. Malayan Banking Berhad & Ors* [2011] 1 LNS 1492; [2012] 3 MLJ 100.

[32] Learned counsel for the respondents, Mr Yusuf Khan, on the other hand, submits that the respondents' action under OS 2399 comes under an exception to the basic principle since the order of 9 November 2010 that was obtained by the Choong Howei (the appellant in Appeal 2785) *via* OS 1926 was obtained by means of a fraudulent concealment of a material fact to the court in that the fact that the respondents had been elected as directors of the company *via* the EGM of 17 September 2009 was not disclosed by the appellant to the court when seeking the OS 1926 Order. Learned counsel refers to the Federal Court case of *Hock Hua Bank Bhd v. Sahari bin Murid* [1980] 1 LNS 92 where Chang Min Tat FJ held:

> But if a judgment or order has been obtained by fraud or where further evidence which could not possibly have been adduced at the original hearing is forthcoming, a fresh action will lie to impeach the original judgment: *Hip Foong Hong v. Neotia & Co.* [1918] AC 888 and *Jonesco v. Beard* [1930] AC 298.

[33] In *Serac Asia Sdn Bhd v. Sepakat Insurance Brokers Sdn Bhd* [2013] 6 CLJ 673 Abdull Hamid Embong FCJ in delivering the judgment of the Federal Court amplified on the exception to the basic principle where fraud is alleged:

> [36] As regards the appellant's submission on the court being *functus officio* and that a fresh suit needs to be filed to strike out a previous regularly obtained order on the ground of fraud, we adopt the finding of this court in *Hock Hua Bank Bhd v. Sahari Murid* [1980] 1 LNS 92; [1981] 1 MLJ 14 which we think has settled these issues. The headnotes from the report in that case, which need no further explanation, or expansion, is now reproduced as our answer to those related questions:

In this case the learned judge had made an order for sale in a foreclosure proceeding. The order was made after hearing all the parties and was made despite a claim of *non est factum* and allegations of fraud and forgery by the respondent. The order was drawn up and perfected. There was no appeal against it. The respondent applied to set aside the judgment and this application was refused. Subsequently the respondent applied again to set aside the previous orders. The learned judge thereupon set aside his order. The appellant appealed.

Held:

(1) the learned judge was *functus officio*;

(2) the court had no power under any application in the same action to alter, vary or set aside a judgment regularly obtained after it had been entered or an order after it has been drawn up, except under the slip rule, so far as it necessary to correct errors in expressing the intention of the court, unless it is a judgment by default or made in the absence of a party at a trial or hearing;

(3) if a judgment or order has been obtained by fraud or where further evidence which could not possibly have been adduced at the original hearing is forthcoming, a fresh action will lie to impeach the original judgment;

(4) in this case the learned judge had no jurisdiction to set aside his own order and the original order must be restored, leaving it to the respondent to take out a fresh action to set aside the order on the ground fraud.

[37] Although both the courts below had referred to the cases of *Ling Kuok Teck & Anor v. Tseng Choon Chin @ Tay Bak Hui & 5 Ors* [1995] 3 CLJ 889 and the *Hock Hua Bank Bhd (supra)*, which cases involved applications to impeach perfected judgments previously obtained on the grounds of fraud or non-disclosure of material documents, both the courts unfortunately missed to observe that in both cases **fresh action**s were filed to trash out the issue of fraud. In fact, Chang Min Tat FJ speaking for the Federal Court in the latter case, clearly stated that a "fresh action will lie to impeach the original judgment", and that the court had "no power under any application **in the same action** to alter, vary or set aside a judgment regularly obtained". (emphasis added)

[38] Fraud on the court is obviously a serious allegation. It requires that higher standard of proof, one of beyond a reasonable doubt. In *Jonesco v. Beard* [1930] AC 298 (HL), Lord Buckmaster observed that "fraud is an insidious disease, and if clearly proved to have been used so that it might deceive the court, spreads to infect the whole body of the judgment". The qualifying phrase "if clearly proved" to us governs the manner on how fraud should be proved. In *Chee Pok Choy & Ors v. Scotch Leasing Sdn Bhd* [2001] 2 CLJ 321, it was held that a judgment may be impeached only for a "deliberate fraud practiced upon the court" and that it is "insufficient

to show that a litigant merely convinced the court through misleading or erroneous evidence" (see the Australian case of *Price v. Stone* [1964] VR 106). It has been otherwise described as "cheating to get an advantage". Thus, to us, there is a need for a fresh action to adjudicate the issue.

[34] We are of the view that in the present case based on the aforesaid authorities the respondents can apply to the court to impugn the order made in the OS 1926 *via* a separate court action, instead of by way of an appeal, because the respondents' allegation is that there had been a fraudulent concealment of a material fact. Thus the matter comes under the exception to the general rule, that is to say, it comes under the *Hock Hua Bank* principle.

[35] But although we rule that the respondents may impugn the earlier order of 9 November 2010 by taking up a separate action in the form of OS 2399, still, the question arises: Was there in the present case a concealment of a material fact as alleged?

[36] But first in passing we wish to remark here that we have this disturbing observation: in the present case there are disputes as to material facts and, therefore, strictly the respondents should have filed a writ action instead of an originating summons to impeach the order of 9 November 2010. But, unfortunately, the appellants on their part did not raise this procedural issue either at the High Court or before us.

[37] Be that as it may, and putting the issue as to the appropriate mode of action aside, in our judgment the learned High Court Judge, with respect, had erred in ruling that there was no full and frank disclosure by the applicant Choong Howei in his OS 1926 application. It is a fact that right up to the time when the OS 1926 was filed on 13 August 2010, the respondents, although elected as directors of the company at the EGM of 17 September 2009, yet they had never registered themselves as directors of the company with the CCM. In fact, after the EGM of 17 September 2009, the respondents did not take control of the management of the company. Therefore, they could not claim to be the directors of the company. This means that the old board of directors still remains as the board of directors of the company right up to the point of time when Choong Howei decided to file the OS 1926 in August 2010. The records of the CCM confirmed this fact.

[38] The respondents put the blame on their non-registration as the new directors of the company with the CCM on the company secretary, Foo Poh Khean, in that the latter, as the company secretary, had refused to certify the extract of the EGM, thereby causing the respondents' application to the CCM to be the new board of directors of the company to be rejected. It will be recalled that Foo Poh Khean was not the secretary for the EGM. At the EGM one Ow Sam Loy was elected by the members present at the EGM to act as the secretary because Foo Poh Khean had refused to act as the

secretary of the EGM and to take down the minutes. But Foo Poh Khean, besides refusing to be the secretary for the purpose of the EGM, had also refused to certify the extract of the EGM. The extract of the EGM not being certified by the company secretary, the CCM, purportedly acting under s. 11(9) of the Companies Act, refused to register the respondents as the new directors of the company. Section 11(9) of the Act reads:

> (9) The Registrar may require a person who submits a document for lodgment with the Registrar to produce to the Registrar such other document, or to furnish to the Registrar such information, as the Registrar thinks necessary in order to form an opinion whether he may refuse to receive or register the document.

[39] The CCM by a letter dated 30 September 2009 insisted that the extract of the EGM must be jointly certified by a director and the company secretary.

[40] But the pertinent point is that although faced with the predicament the respondents did not take the necessary legal action that was open to them to assert their right to be registered with the CCM as the new directors of the company. For instance, the respondents could have appealed to the High Court pursuant to s. 11(10) of the Companies Act against the refusal of the CCM to register the new board of directors. Section 11(10) of the Act provides:

> (10) Any person aggrieved by the refusal of the Registrar to register any corporation or to register or receive any document or by any act or decision of the Registrar may appeal within thirty days of the decision of the Registrar to the Court which may confirm the refusal, act or decision or give such directions in the matter as seem proper or otherwise determine the matter but this subsection shall not apply to any act or decision of the Registrar:
>
> (a) in respect of which any provision in the nature of the appeal or review is expressly provided in this Act; or
>
> (b) which is declared by this Act to be conclusive or final or is embodied in any document declared by this Act to be conclusive evidence of any act, matter or thing.

[41] They could not just sit back and do nothing but to merely lament on the conduct of Foo Poh Khean as being the cause of the problem that they had with the CCM. Since the respondents failed to enforce their right to be registered as the new directors of the company after a substantial lapse of time, Choong Howei, pursuant to the information obtained from the search made at the CCM, had the right to treat the old board of directors (meaning the appellants in Appeal 2786), and not the respondents, as the directors of the company at the material time, that is to say, at the time of filing the OS 1926; and the question of Choong Howei concealing a material fact as to the affairs of the company in his OS 1926 application does not arise. It follows

then that the respondents had failed to establish fraudulent concealment of a material fact; and it also follows then that the OS 1926 order of 9 November 2010 cannot be said to be irregular or a nullity.

Second Issue: Whether The Respondents Were Guilty Laches

[42] Another reason why we hold that these appeals must be allowed is that the respondents were guilty of laches. They were elected as the new directors of the company on 17 September 2009; yet right until they filed the OS 2399 on 14 September 2011, a lapse of two years, they did nothing to ensure that they were registered with CCM as the new directors; instead, they had allowed the names of the old directors to remain in the records of the CCM.

[43] But it is not only that. During the two-year period the respondents had allowed two AGMs of the company to take place, that is to say, the AGM of 30 December 2010 (pursuant to the court order of 9 November 2010), and the AGM of 27 June 2011. The respondents refused to attend the two AGMs although they were duly notified. They took no steps to promptly challenge the validity of either the order of 9 November 2010 or the two AGMs. At these AGMs, directors of the company were elected and the audited accounts of the company were approved; dividends were declared and the respondents accepted the dividends paid to them without protest. It would thus be unjust to grant the orders prayed for by the respondents in OS 2399. The often cited principle on laches is well stated by Lord Selborne in the landmark case of *Lindsay Petroleum Co v. Hurd* (1874) LR 5 PC 221:

> But in every case if an argument against relief which otherwise would be just is founded on mere delay, that delay of course not amounting to a bar by any Statute of Limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances always important in such cases are the length of the delay, and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other so far as relates to the remedy.

[44] A local authority on the principle on laches can be found in *Alfred Templeton & Ors v. Mount Pleasure Corp Sdn Bhd* [1989] 1 CLJ 693; [1989] 1 CLJ (Rep) 219; [1989] 2 MLJ 202 where Edgar Joseph Jr J of the High Court of Penang held:

> Laches is an equitable defence implying lapse of time and delay in prosecuting a claim. A court of equity refuses its aid to a stale demand where the plaintiff has slept upon his rights and acquiesced for a great length of time. He is then said to be barred by laches. In determining whether there has been such a delay as to amount to laches the court considers whether there has been acquiescence on the plaintiff's part and any change of position that has occurred on the part of the defendant. The doctrine of laches rests on the consideration that it is unjust to give a plaintiff a remedy where he has by his conduct done that which might fairly be regarded as equivalent to a waiver of it or where by his conduct

A and neglect he has, though not waiving the remedy, put the other party in a position in which it would not be reasonable to place him if the remedy were afterwards to be asserted: *14 Halsbury's Laws of England* (3rd Ed) paras 1181, 1182. Laches has been succinctly described as 'inaction with one eye's open'.

B **[45]** In the present case on the facts it is clear to us that the respondents had slept upon their rights and acquiesced for a great length of time. Thus the respondents by reason of the inordinate delay and their conduct are estopped from challenging the validity of the order of 9 November 2010 or the validity of the two AGMs.

C **[46]** We therefore set aside the order of the High Court Judge of 22 October 2012.

Appeals allowed with costs.

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